IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 319 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHENDRA VALLABHDAS SAMPAT - Petitioner(s)
Versus
STATE OF GUJARAT & 3 - Respondent(s)

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Appearance :

MR CL SONI for Petitioner(s) : 1,
Mr K P Rawal, Asstt.GOVERNMENT PLEADER for Respondent(s) : 1,
DS AFF.NOT FILED (N) for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2,
NOTICE SERVED for Respondent(s) : 3,
MR HARESH J TRIVEDI for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 13/07/2006

C.A.V. JUDGMENT

1. The petitioner has, invoking the provisions of Articles 14, 16 and 226 of the Constitution, challenged the order of his compulsory retirement and prayed for a direction

to the respondent to pay him salary w.e.f. 16.12.2005 with all consequential benefits and continuity of service.

2. While the petitioner was serving at Primary Health Centre as Medical Officer, Class II, he was served with charge-sheet dated 12.5.2000 alleging that he was indulging in private business and even selling to the Government the goods which he was producing. The petitioner was called upon by the said charge-sheet dated 12.5.2000 to submit his statement of defence within 30 days even as the details of the charges, the list of documentary evidence and list of witnesses were simultaneously supplied to him. The petitioner, in his reply dated 29.5.2000, stated that he was no longer in Government service since he had already submitted his resignation on 14.2.2000 which was to take effect from 14.3.2000; and, since he was not intending to serve, he had nothing more to say. Two months thereafter, he submitted another reply pressing his claim for acceptance of his resignation. A departmental enquiry was initiated thereafter and it resulted into the findings to the effect that the charges levelled against him were proved and he was ordered to be compulsorily retired by the impugned order dated 3.12.2005.

3. In order to challenge the above

proceedings and order, the petitioner has alleged that he had remained present at the departmental enquiry which was held on 31.7.2003 by the Enquiry Officer. Thereafter, he had remained present and participated in the enquiry on 14.10.2003, 21.11.2003 and 28.11.2003. He is stated to have written a letter dated 28.11.2003 to the Enquiry Officer to permit him to take help of an Advocate but he was never informed about the decision on that application, according to the allegation. It is also alleged that, after the request for permitting the help of an Advocate, the petitioner was never intimated about any date of hearing at any stage. Upon receipt of the intimation dated 6.3.2004 of the Enquiry Officer, he is alleged to have addressed the letter dated 16.3.2004 enquiring as to who had signed the postal acknowledgment receipts for the receipt by the petitioner of the notices of the Enquiry Officer. The petitioner sent his reply dated 7.4.2004 making grievance about non-receipt of the notices issued by the Enquiry Officer and requesting for further opportunity to defend before the expiry of the time for submitting his final statement of defence. The elaborate findings and report of the Enquiry Officer were prepared and submitted on 24.6.2004 and received by the petitioner on 22.6.2005. The petitioner made his last representation on 05.07.2005 and after considering it, the impugned

order dated 3.12.2005 came to be passed.

4. The grievance made by the petitioner before this Court is to the effect that the notices issued by the Enquiry Officer after 28.11.2005 were not received by him, that an opportunity of cross-examining the witnesses of the respondent was not afforded to him and that his application for engaging an Advocate to defend him in the enquiry was either not decided or the decision thereon was not conveyed to him.

5. Learned counsel Mr Soni relied upon the judgment of Madras High Court in ***S. Gnanasambandam v. Tamil Nadu Cements Corporation Ltd.*** (2002 (1) SLR 623) to submit that, if the delinquent were pitted against a legally trained person and not given the benefit of assistance of a lawyer, it would violate the principles of natural justice. He relied upon the judgment of Rajasthan High Court in ***Rampal Chouhan v. Marwar Gramin Bank (2004 (5) SLR*** 423) to submit that, if the delinquent were not allowed to cross examine the witnesses, order of dismissal based on the enquiry report had to be set aside. The judgment of this Court in M***uljibhai Mafatlal Baraiya v. Director of M.E.R, Ahmedabad*** (1993) 1 GLR 629 was relied upon for the proposition that ordinarily the delinquent is entitled to the

assistance of a friend or a legal counsel by an Advocate in departmental proceedings. The petitioner in that case was a Class IV employee facing serious charges, but it was not found necessary by the authority to allow him to engage either a lawyer or a representative of any Union. The circumstances which necessitated the department to refuse services of a lawyer were not expedient and therefore, the Court held that, it could not be said that there was reasonable opportunity to the petitioner in the departmental proceedings.

5.1 Following observations of the Supreme Court in ***Board of Trustees, Port of Bombay v. Dilipkumar (AIR 1983 SC 109)*** made in similar circumstances of refusal of request of the employee to be represented by a lawyer, were also relied upon:

> "Therefore, apart from general propositions, in the facts of this case, this enquiry would be a one sided enquiry weighted against the delinquent officer and would result in denial of reasonable opportunity to defend himself. He was pitted against the two legally trained minds and one has to just view the situation where a person not admitted to the benefits of niceties of law is pitted against two legally trained minds and then asked to fend for himself. In such a situation, it does not require a

a long argument to convince that the delinquent employee was denied a reasonable opportunity to defend himself and the conclusion arrived at would be in violation of one of the essential principles of natural justice, namely, that a person against whom enquiry is held must be afforded a reasonable opportunity to defend himself."

....

5.2 Relying upon another judgment of this Court in ***B.M. Patel v. K.K. Mankad, Supdt.Engineer*** (1993 (1) GLH 506, it was also submitted that the power exercisable by the punishing authority were quasi-judicial in nature and, therefore, the order of punishment passed by such authority has to be supported by reasons.

6. By filing an affidavit-in-reply of the Under Secretary, Health and Family Welfare Department on behalf of the respondent, it is submitted that the petitioner was found to be doing his private business and selling the product to the State Government, and thereby had committed breach of Rule 15 of the Gujarat Civil Services (Conduct) Rules, 1971. That he was afforded ample opportunity to defend himself at the enquiry and after considering the material on record and defence of the petitioner, the Enquiry Officer had submitted enquiry report dated 18.6.2005 wherein the charges were held to have

been proved. That four notices were sent to the petitioner intimating him about the dates of hearing and despite the service of such notices at his given address, he had made the grievance that they were not received. That he had remained absent without leave from 5.1.2004 to 15.3.2004 due to which the notices sent by R.P.A.D. were received by the tracer and peon of the petitioner at his address and he seemed to have remained unauthorisedly absent only with the intention to see that the notice issued for hearing could not be served upon himself. It is further stated that the petitioner had, vide letter dated 11.8.1996, requested the District Health Officer to purchase the material from the partnership firm, where he was a partner. The petitioner had also admitted in his reply dated 7.4.2004 that he was an occupier of the premises where the factory was going on.

7. On perusing the report dated 24.6.2004 of the Enquiry Officer, it appears that the enquiry was initiated on 7.7.2003 with an order to complete it within two months. Thereafter the proceedings were held on 31.7.2003, 14.10.2003 and 21.11.2003 wherein the petitioner had attended the enquiry. While the next hearing on 28.11.2003 was cancelled, the petitioner had applied for permission to engage an Advocate and that application was forwarded by the Enquiry

Officer to the disciplinary authority. After the decision dated 24.12.2003, the next hearing was fixed on 22.1.2004 and notice therefor was issued on 7.1.2004. Since then the petitioner had ceased to attend and remained absent on 22.1.2004, 10.2.2004 and 6.3.2004 despite the intimations sent by Registered A.D. by the Enquiry Officer. Therefore, on 6.3.2004, the Enquiry Officer decided to proceed ex-parte, and recorded evidence. Copy of the order and the proceedings dated 6.3.2004, were sent to the petitioner and were received by him at the same address. The petitioner addressed a letter dated 16.3.2004 stating that despite his serious sickness, his application for engaging an Advocate was turned down, that the notices for hearing were not received by him, that the statements recorded in his absence were not supplied to him and he demanded information about the signatures acknowledging receipt of the notices, copies of the statements of witnesses and opportunity to cross examine the witnesses.

7.1 As for the charge and the documentary and oral evidence in support thereof, it is recorded that in the letter dated 11.8.1996 addressed to the District Health Officer, District Panchayat, Bhavnagar, M/s. Mahindra Cotton Wool Industries, Bhavnagar had written that the Regional Dy.Director, Medical and Health Services,

Bhavnagar had approved the rate of Rs. 34.50 for 500 gram of absorbent cotton wool. That letter was signed by the petitioner in the capacity of a partner of that firm. That document was corroborated by the statement of Dr.S.R. Patel, the Chief District Medical Officer who was examined on 6.3.2004. Another witness Mr V N Patel, Incharge, Factory Inspector had stated that an application for licence under the Factories Act was received on 10.2.1997 from M/s. Mahindra Cotton Wool Industries and that application was signed by the petitioner as partner of that firm. Several other documents annexed with the said application were also signed in similar capacity by the petitioner. A copy of the partnership deed showing the petitioner to be a partner was also submitted by the petitioner. Having regard to the facts on record, the Enquiry Officer found that the petitioner was resorting to patent lies during the proceedings and found the charge to have been proved on the basis of documentary evidence.

8. The petitioner had, on being called upon to make his final submissions after receipt of the enquiry report, alleged violation of principles of natural justice in the conduct of the departmental enquiry and, as for the charges, only stated that he was in fact not occupier of the premises of which he was stated to be the

occupier.

9. It is clear from the above record of facts and contentions that the petitioner had already submitted his resignation and had no worthwhile defence to the charge of indulging in private business. It was directly put to the learned counsel for the petitioner that if, apart from the allegations of violation of principles of natural justice, the petitioner had any defence or statement of facts to make about the substance of the charge, he was permitted to make it before this Court. Learned counsel Mr Soni responded only with the submission that he could not dispute, at this stage, the documentary evidence produced before the Enquiry Officer and such opportunity could only be given during the course of enquiry where the petitioner could have had full opportunity to cross examine the witnesses. He submitted that, that opportunity having been lost due to lack of proper notice to the petitioner, the enquiry has to be held to be vitiated and the punitive order based thereon, has to be quashed.

10. Although the spirit of the principles of natural justice remains uncodified, the rules of its flexible application are often embodied in the procedure prescribed for departmental proceedings. The Gujarat Civil Services

(Discipline & Appeal) Rules, 1971 (Part IV) admittedly applicable in the facts of the present case provide for the procedure for imposing major penalties. The relevant parts of Rule 9 may be reproduced as under:

> "**9. Procedure for imposing major penalties:-**
>
> *(1) No order imposing any of the penalties specified in items (4) to (8) of rule 6 shall be passed except after an inquiry, held as far as may be, in the manner provided in this rule and rule 10 or in the manner provided by the Public Servants (Inquiry) Act, 1850 where such inquiry is held under that Act.*
>
> *(2) ....*
>
> *(3) ....*
>
> *(4) The Disciplinary Authority shall deliver or cause to be delivered to the Government servant a copy of the articles of charge, the statement of the imputations of misconduct or misbehaviour or of any culpable act or omission and a list of documents and witnesses by which each article of charges is proposed to be sustained and shall require the Government servant to submit, within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person.*
>
> *(5) ....*
>
> ***Note**: (Inserted vide GN/GAD/No.GS/86/17/CDR/ 1084/565/Inq.Cell dated 16.4.1986)*

The Government servant may also take the assistance of a retired Government servant to present the case on his behalf subject to such conditions as may be determined in general or special orders issued by the Government from time to time.

(6) ....

(7) ....

(8) If the Government servant who has not admitted any of the articles of charge in his written statement of defence, appears before the Inquiry Authority, such authority shall ask him whether he is guilty or has any defence to make and if he pleads guilty to any of the articles of charge, the Inquiry Authority shall record the plea, sign the record and obtain the signature of the Government servant thereon.

(9) ....

(10) The Inquiry Authority shall, if the Government servant fails to appear within the specified time or refuses or omits to plead, require the Presenting Officer to produce the evidence by which he proposes to prove the articles of charges, and shall adjourn the case to later date not exceeding thirty days, after recording an order that the Government servant may for the purpose of preparing his defence-

(i) inspect within five days of the order or within such further time not exceeding five days as the Inquiring Authority may allow, the documents specified in the list referred to in sub-rule

(3);

(ii) submit a list of witnesses to be examined on his behalf.

(11) ....
(12) ....

(13) On the date fixed for the inquiry, the oral and documentary evidence by which the articles of charges are proposed to be proved shall be produced by or on behalf of the Disciplinary Authority. The witnesses shall be examined by or on behalf of the Presenting Officer and may be cross-examined by or on behalf of the Government servant. The Presenting Officer shall be entitled to re-examine the witnesses on any points on which they shall have been cross-examined, but not on any new matter, without the leave of the Inquiry Authority. The Inquiry Authority may also put such questions to the witnesses as it thinks fit.

(14) ....
(15) ....
(16) ....

(17) The Inquiry Authority may, after the Government servant closes his case, and shall if the Government servant has not examined himself, generally, question him on the circumstances appearing against him in the evidence for the purpose of enabling the Government servant to explain any circumstances appearing in the evidence against him.

(18) ....

(19) <u>If the Government servant</u> to whom a copy of the articles of charge has been delivered does not submit

the written statement of defence on or before the date specified for the purpose or does not appear in person before the Inquiry Authority or otherwise fails or refuses to comply with the provisions of this rule, the Inquiry Authority may hold the inquiry ex-parte"

(underlines added)

11. The principles of natural justice are not codified with a view to ensuring fair-play and opportunity of hearing without making the proceedings too technical and so cumbersome as to defeat the ends of justice. The Hon'ble Supreme Court reiterated in ***K.L.Tripathi v. State Bank of India [AIR 1984 SC 273]*** that the rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principles of natural justice on the ground of absence of opportunity of cross-examination, it has to be established that prejudice has been caused to the party concerned by the procedure followed. Again, in ***Managing Director, ECIL, Hyderabad v. B.Karunakar*** [AIR 1994 SC 1074], Their Lordships held that, whenever a complaint was made before a Court that some principles of natural justice had been contravened, the Court had to decide whether the observance of that rule was necessary for a just decision on the facts of that case. It was also observed that the theory of reasonable

opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions.

12. Recently, in ***DIVISIONAL MANAGER, PLANTATION DIVISION, ANDAMAN AND NICOBAR ISLANDS*** **v.** ***MUNNU BARRICK*** **[2005 AIR SCW 109]**, it was observed, as under, by the Apex Court:

> *"17. The principles of natural justice cannot be put in a strait-jacket formula. It must be viewed with flexibility. In a given case, where a deviation takes place as regards compliance of the principles of natural justice, the Court may insist upon proof of prejudice before setting aside the order impugned before it.*

In ***N.K.PRASADA v. GOVERNMENT OF INDIA*** **[(2004) 6 SCC 299]**, the Supreme Court quoted its earlier observations, as under, in *Sohan Lal Gupta v. Asha Devi Gupta [(2003) 7 SCC 492]* and held that the principles of natural justice, it is well settled, cannot be put into a straitjacket formula.

> *"29. The principles of natural justice, it is trite, cannot be put in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of*

natural justice but also to show that he was seriously prejudiced thereby."

It is also categorically held in the above judgment that, if a party, after having proper notice, chose not to appear, he at a later stage cannot be permitted to say that he had not been given a fair opportunity of hearing.

12.1 The latter pronouncement of law by the Apex Court in **CANARA BANK v. V.K.AVASTHY [AIR 2005 SC 2090]**, particularly the apposite part thereof, may be reproduced here as under:

"7. The crucial question that remains to be adjudicated is whether principles of natural justice have been violated; and if so, to what extent any prejudice has been caused. If may be noted at this juncture that in some cases it has been observed that where grant of opportunity in terms of principles of natural justice do not improve the situation, 'useless formality theory' can be pressed into service.

8. Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties."

16. ....Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not determined.

17. ....Wade (Administrative Law, 5th Edn. 1994, pp.526-530) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour of he has to prove a case of substance or if he can prove a 'real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their 'discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. ......We do not propose to express any opinion on the correctness or otherwise of the 'useless formality theory' and leave the matter for decision in an appropriate case, inasmuch as the case before us, 'admitted and indisputable' facts show that grant of a writ will be in vain as pointed by Chinnappa Reddy, J."

18. ....As is rightly pointed out by learned counsel for the appellant, unless failure of justice is occasioned or that it would not be in public interest to do so in particular case, this Court may refuse to grant relief to the concerned employee (Gadde Venkateswara Rao v. Govt. of A.P. AIR 1966 SC 828). It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. In a

given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing.(Charan Lal Sahu v. Union of India AIR 1990 SC 1480).

12.2 On the subject of punishment, the Supreme Court, quoting from ***Om Kumar and others v. Union of India [(2001) 2 SCC 386],*** observed as under:

"25. ....Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as 'arbitrary' under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment."

13. Applying the above principles in the facts of the present case, it clearly appears that the petitioner had initially refused to participate in the enquiry on the plea that he had already resigned and then, under the pretext of pendency of his application for engaging an advocate, absented himself from the enquiry

proceedings. Since the Enquiry Officer had made reasonable efforts to serve upon him the notices of holding of the proceedings by sending them by registered post A/D at his given address, it cannot be said that reasonable opportunity was not given to the petitioner to attend and cross-examine the witnesses. Instead, it appears that the petitioner was avoiding the service and pleading ignorance of the proceedings at the crucial stage of examination of witnesses after attending the enquiry proceedings on earlier occasions. There was substantial compliance with the aforesaid statutory provisions of Rule 9 of the Rules which provided for the manner in which the enquiry, as far as may be, was required to be held. Therefore, neither the Rules nor the above provisions permit taking of a narrow, pedantic and technical view for finding out violation of the principles of natural justice without the proof of any prejudice. Again, in the facts of the present case, the petitioner did not have, at any stage, any defence to the charge of doing business while in government service; for which documentary evidence was placed on record, the genuineness of which was never disputed by him even before this Court.

14. Therefore, in short, neither any violation of the principles of natural justice nor prejudice to the petitioner on account of his

absence during the effective proceedings of the enquiry could be established. On the contrary, it would appear that the petitioner had attempted to take advantage of his own fault in attending the enquiry and peddled his technical pleas with prolonged arguments to regain the job and reap the consequential benefits which he had renounced by his own resignation. It is often this kind of litigations that consume more time of the Courts than the litigation of genuinely aggrieved parties who are made to wait for decades for justice.

15. In the facts and for the reasons discussed hereinabove, the petition is dismissed and Notice is discharged with costs quantified at Rs.5,000/- which shall be paid by the petitioner to the respondent No.2 within a period of one month from today and report thereof shall be placed on the record of this petition. If the report is not submitted in the Registry on or before 12.8.2006, the matter shall be placed before the Court taking up Contempt of Court matters for appropriate orders.

(D.H.WAGHELA, J.)

msp